IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 02-33669

SAMUEL RICHARD HARRIS
a/k/a RICK HARRIS
f/d/b/a SOUTHERN AUTO SALES

Debtor

UNION PLANTERS BANK, N.A.

Plaintiff

v. Adv. Proc. No. 04-3178

SAMUEL RICHARD HARRIS

Defendant

MEMORANDUM ON MOTION TO DISMISS

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court upon the Complaint to Determine Dischargeability of Debt or in the Alternative to Deny Debtor's Discharge as to Union Planters Bank, N.A. (Complaint) filed by the Plaintiff on July 14, 2004, requesting that the court render a monetary judgment against the Defendant/Debtor (Debtor) in favor of the Plaintiff, that the court determine the judgment to be nondischargeable under either 11 U.S.C.A. § 523(a)(2), (4), or (6) (West 1993 & Supp. 2004), or that the court deny the Debtor's discharge pursuant to 11 U.S.C.A. § 727 (West 1993).

On August 20, 2004, the Debtor filed a Motion to Dismiss for failure to state a claim upon which relief can be granted. The Debtor avers that although the Plaintiff has requested relief under § 523(a)(2), it has not pled sufficient facts to indicate which subsection. Additionally, the Debtor argues that the Plaintiff has not complied with Federal Rule of Civil Procedure 9(b), applicable to adversary proceedings pursuant to Rule 7009 of the Federal Rules of Bankruptcy Procedure, by failing to state with particularity the facts upon which it relies under § 523(a)(2)(A), (B), and/or (a)(4), which are predicated upon a finding of fraud. Furthermore, the Debtor argues that the Plaintiff makes a blanket objection to discharge under § 727, without expressing facts to support a finding under any subsection. Finally, although the Plaintiff recites the language of § 727(a)(5) as a basis for objecting to discharge, the Debtor argues that the Plaintiff has not provided adequate detail or facts to notify him how that subsection is triggered.

The Plaintiff did not file a response to the Motion to Dismiss within twenty days, as prescribed by E.D. Tenn. LBR 7007-1, which states that the failure to file a response "shall be

construed by the court to mean that the respondent does not oppose the relief requested by the motion." E.D. Tenn. LBR 7007-1. Notwithstanding that the Plaintiff does not oppose the Motion to Dismiss, the court will discuss its ruling through this Memorandum.

I

The Plaintiff's Complaint alleges that on January 17, 2002, the Plaintiff loaned the Debtor $14,700.00, together with 7.5% interest, pursuant to a Commercial Security Agreement and Promissory Note (Note). Under the terms of the Note, the Debtor was required to make payments to the Plaintiff in the amount of $399.70 for forty-two months. A copy of the Note is not attached to the Complaint. The Complaint further avers that the Debtor made only one payment on the loan and now owes more than the original balance after the accrual of interest and late charges; however, the Complaint does not state an amount of the total indebtedness owed.

The Complaint also contains the following allegations: (1) that the Plaintiff "relied on the statements and the assurances of the debtor and the information submitted by the debtor in making its loan to the debtor[;]" (2) that the Debtor "attempted to give one 1994 Chevrolet C 3500 Truck as collateral for the loan, but . . . failed to have Union Planters' lien noted on the Certificate of Title as agreed[;]" (3) "[t]hat because of the debtor's present financial situation, the debtor has not met the best interest of creditor's test and the debtor has the ability to pay some portion of his income to his unsecured creditors under a Chapter 13 plan[;]" (4) that the Debtor has not satisfactorily explained "a loss of assets and deficiency

of assets to meet the debtor's liabilities . . . [and] took funds from a reserve fund which were unearned and did not return them when requested even though funds did not belong to him[;]" and (5) that the Plaintiff "has been damaged by the reliance on the debtor's statements, information and assurances that he would note Union Planters' lien and thereafter selling said collateral."

The Plaintiff's prayer for relief asks the court to "declare that the obligations owed to Union Planters by the defendant be declared non-dischargeable pursuant to 11 U.S.C. § 523(a)(2), (4) and (6) and that a monetary judgment be rendered[,]" or alternatively that the court "declare pursuant to 11 U.S.C. § 727, the debtor's discharge be denied."

II

A defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6) (applicable in adversary proceedings pursuant to FED. R. BANKR. P. 7012(b)). When contemplating a motion to dismiss under Rule 12(b)(6), the court should "construe the complaint in the light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff can prove a set of facts in support of its claims that would entitle it to relief." *Bovee v. Coopers & Lybrand, C.P.A.*, 272 F.3d 356, 360 (6th Cir. 2001). All factual allegations are accepted as true, but the court is not required to accept legal conclusions or unwarranted factual inferences as true. *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 533 (6th Cir. 2002). Instead, the focus should be upon "whether the plaintiff has pleaded a cognizable claim[,]" *Marks v.*

Newcourt Credit Group, Inc., 342 F.3d 444, 452 (6th Cir. 2003), and the complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Buchanan v. Apfel*, 249 F.3d 485, 488 (6th Cir. 2001) (quoting *Conley v. Gibson*, 78 S. Ct. 99, 102 (1957)).

Additionally, a defendant may move to dismiss a complaint that does not meet the requirements set forth in the Federal Rules of Civil Procedure. In particular, Rule 9(b) states that "[i]n all averments of fraud . . ., the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." FED. R. CIV. P. 9(b) (applicable to adversary proceedings by virtue of FED. R. BANKR. P. 7009).

> In ruling upon a motion to dismiss under Rule 9(b) for failure to plead fraud "with particularity," a court must factor in the policy of simplicity in pleading which the drafters of the Federal Rules codified in Rule 8. Rule 8 requires a "short and plain statement of the claim," and calls for "simple, concise, and direct" allegations. Indeed, Rule 9(b)'s particularity requirement does not mute the general principles set out in Rule 8; rather, the two rules must be read in harmony. *See, e.g., Credit & Finance Corp., Ltd. v. Warner & Swasey, Co.*, 638 F.2d 563, 566 (2d Cir. 1981). "Thus, it is inappropriate to focus exclusively on the fact that Rule 9(b) requires particularity in pleading fraud. This is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules." 5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE: Civil § 1298, at 407 (1969).

Michaels Bldg. Co. v. Ameritrust Co., N.A., 848 F.2d 674, 679 (6th Cir. 1988) (footnote omitted). Accordingly, in order "to satisfy Federal Rule 9(b), 'the pleader must state the time, place and content of the false representation, the fact misrepresented, and what was obtained or given as a consequence of the fraud.'" *Hartley v. Elder-Beerman Stores Corp. (In re Elder-*

Beerman Stores Corp.), 222 B.R. 309, 312 (Bankr. S.D. Ohio 1998) (quoting *Bell v. Bell*, 132 F.3d 32, 1997 WL 764483, at *5 (6th Cir. Dec. 3, 1997)). Pursuant to Rule 8, these elements need only be pled "with a short and plain statement." *Elder-Beerman Stores Corp.*, 222 B.R. at 312.

The Plaintiff cites § 523(a)(2), (4), and (6) as the statutory basis for a determination of nondischargeability. The party seeking a determination of nondischargeability bears the burden of proving all elements by a preponderance of the evidence. *Grogan v. Garner*, 111 S. Ct. 654, 661 (1991). Moreover, § 523(a) is construed strictly against the Plaintiff and liberally in favor of the Debtor. *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998); *Haney v. Copeland (In re Copeland)*, 291 B.R. 740, 759 (Bankr. E.D. Tenn. 2003).

A

Subsection (a)(2) of § 523 allows for the nondischargeability of debts incurred through fraudulent means, predicated upon either material misrepresentations or false financial documents, which are mutually exclusive. *See* 11 U.S.C.A. § 523(a)(2); *Copeland*, 291 B.R. at 759. To satisfy § 523(a)(2)(A), the Plaintiff must prove that the Debtor obtained value through material misrepresentations that he knew were false or that he made with gross recklessness, that the Debtor intended to deceive the Plaintiff, that the Plaintiff justifiably relied on the Debtor's false representations, and that the Plaintiff's reliance was the proximate cause of his losses. *See Copeland*, 291 B.R. at 760 (citing *Rembert*, 141 F.3d at 280). A

determination of nondischargeability under § 523(a)(2)(B) requires proof that the Plaintiff reasonably relied upon false financial documents concerning the Debtor or an insider, provided to the Plaintiff by the Debtor, who intended to deceive the Plaintiff. *Copeland*, 291 B.R. at 780 (quoting 4 COLLIER ON BANKRUPTCY ¶ 523.08[2] (Lawrence P. King ed., 15th ed. rev. 2002)).

Here, with the exception of making generalized statements, the Complaint does not contain sufficient factual allegations to support a finding under either of these subsections. The Complaint alleges that the Plaintiff relied upon statements, assurances, and information submitted by the Debtor in making the loan. These allegations encompass both subsection (A) and (B), and even though the subsections are mutually exclusive, the Plaintiff is not precluded from arguing both subsections if the facts so dictate. Nevertheless, the Plaintiff has not stated any facts that fit under either scenario. The Note forming the basis for the debt was not attached to the Complaint, and the Plaintiff did not even provide the outstanding balance on the Note. The Plaintiff did not state any facts concerning what type of representations were made by the Debtor or their content. Finally, the Plaintiff offered no proof concerning the basis for or degree of its reliance upon representations or documents presented by the Debtor. Taking the Complaint in a light most favorable to the Plaintiff, the court finds that it has not pled sufficient factual allegations to support a finding under either § 523(a)(2)(A) or (B).

Furthermore, the Complaint does not sufficiently provide the Debtor with "fair notice of the substance of [the] plaintiff's claim in order that the defendant may prepare a

responsive pleading[,]" as required by Rule 7009. *Michaels Bldg. Co.*, 848 F.2d at 679 (finding that the complaint met the particularity requirements of Rule 9(b) by specifying the parties to the alleged fraud, the allegedly content of the fraudulent representations, how the representations were misleading or false, the time and place the representations were made, the defendants' fraudulent intent, the plaintiff's reliance on the representations, the injury incurred as a result of the fraud, and by attaching the fraudulent loan documents to the complaint). "Averments of fraud must be stated with particularity." *In re LTV Steel Co., Inc.*, 288 B.R. 775, 780 (Bankr. N.D. Ohio 2002) (citing FED. R. BANKR. P. 7009(b); FED. R. CIV. P. 9(b)). "[T]he threshold test is whether the complaint places the defendant on 'sufficient notice of the misrepresentation,' allowing the defendant[] to 'answer, addressing in an informed way plaintiffs [sic] claim of fraud.'" *LTV Steel Co.*, 288 B.R. at 780 (quoting *Coffey v. Foamex L.P.*, 2 F.3d 157, 162 (6th Cir. 1993)) (citation omitted). In this case, however, the Plaintiff's Complaint does not set forth any allegations whatsoever regarding the subjective fraudulent intent of the Debtor. It does not state what representations were false or misleading or how the Plaintiff relied thereupon, and it does not attach copies of any documents. Even in a light most favorable to the Plaintiff, the court finds that the Complaint does not sufficiently set forth facts that satisfy Rule 7009 or that state a claim upon which relief may be granted based upon § 523(a)(2)(A) or (B).

B

The next basis for relief relied upon by the Plaintiff in the Complaint is § 523(a)(4), which allows a debt obtained by embezzlement, larceny, or through fraud or defalcation while acting in a fiduciary capacity to be nondischargeable. *See* 11 U.S.C.A. § 523(a)(4). For the purposes of § 523(a)(4), embezzlement is "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6th Cir. 1996). Larceny under § 523(a)(4) is proved if the debtor wrongfully and with fraudulent intent takes property from its rightful owner, *see Great Am. Ins. Co. v. O'Brien (In re O'Brien)*, 154 B.R. 480, 483 (Bankr. W.D. Tenn. 1993) (citing *Kaye v. Rose (In re Rose)*, 934 F.2d 901, 903 (7th Cir. 1991)), and differs from embezzlement because the embezzler's initial acquisition of the property at issue is lawful. *Aristocrat Lakewood Nursing Home v. Dryja (In re Dryja)*, 259 B.R. 629, 632 (Bankr. N.D. Ohio 2001). Defalcation under § 523(a)(4) requires proof of: "1) a fiduciary relationship; 2) breach of that fiduciary relationship; and 3) a resulting loss." *R.E. Am., Inc. v. Garver (In re Garver)*, 116 F.3d 176, 178 (6th Cir. 1997). Additionally, in order to prove a fiduciary relationship, "the debtor must hold funds in trust for a third party." *Garver*, 116 F.3d at 179. Accordingly, "the defalcation provision of § 523(a)(4) is limited to only those situations involving an express or technical trust relationship arising from placement of a specific res in the hands of the debtor." *Garver*, 116 F.3d at 180.

Subsection (a)(4), like subsection (a)(2), is based upon fraudulent actions of a debtor. Once again, the court finds the Complaint does not state sufficient facts to state a claim upon which relief may be granted, nor does it state with particularity any fraudulent intent of the Debtor. The only averments in the Complaint that may be construed as invoking § 523(a)(4) are those concerning the Debtor's failure to have a lien noted on a certificate of title to a truck that he later sold and the Debtor's taking of unearned funds from a reserve fund and failing to return them after being requested to. However, the Complaint does not offer any further facts or explanation concerning these allegations. Specifically, as to the allegation that the Debtor failed to note the Plaintiff's lien on a truck, the Complaint does not offer any facts concerning an agreement to pledge the truck as collateral, does not attach any such agreement, and does not state facts concerning the subsequent sale of the truck, such as when it was sold and to whom. Similarly, with regard to the reserve fund, the Complaint does not state what the reserve fund is, where the reserve fund is located, to whom it belongs, the amount that the Debtor allegedly took, whether the Debtor was aware of his actions, by whom he was requested to return the funds, and whether he was actually required to return them.

None of the elements of § 523(a)(4) can be proved based upon the allegations contained in the Complaint, nor does the Complaint state with particularity sufficient circumstances concerning fraud and the Debtor's fraudulent intent. Taking the Complaint in a light most favorable to the Plaintiff, the court finds that it does not state a claim upon which relief may be granted pursuant to § 523(a)(4).

C

The Complaint also avers that the court should award it a nondischargeable judgment pursuant to § 523(a)(6), which addresses "willful and malicious" injuries. In order to be successful under this subsection, the Plaintiff must prove the existence of "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury," *Kawaauhau v. Geiger*, 118 S. Ct. 974, 977 (1998), which requires that the Debtor either desired to cause the consequences of his actions, or he believed with reasonable certainty that such consequences will occur. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir. 1999); *Guthrie v. Kokenge (In re Kokenge)*, 279 B.R. 541, 543 (Bankr. E.D. Tenn. 2002).

Here, the Complaint does not contain any allegations or facts concerning a willful and/or malicious injury it incurred at the hands of the Debtor. Even in a light most favorable to the Plaintiff, the court finds that the Complaint does not sufficiently set forth any circumstances specific to § 523(a)(6) that would provide the Debtor with adequate notice as to what action he committed to support a determination of nondischargeability thereunder.

III

Finally, the Plaintiff requests that the court deny the Debtor's discharge under § 727. Section 727(a) is the provision through which Chapter 7 debtors receive a general discharge of their pre-petition debts, unless one of ten statutory limitations exists. *See* 11 U.S.C.A.

§ 727(a)(1) - (10). Section 727(a) is liberally construed in favor of debtors, and the party objecting to discharge bears the burden of proof by a preponderance of the evidence. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000); *Barclays/Am. Bus. Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 393 (6th Cir. 1994); FED. R. BANKR. P. 4005.

The only limitation averred by the Plaintiff in the Complaint is the Debtor's failure "to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities[.]" 11 U.S.C.A. § 727(a)(5). For a denial of discharge under § 727(a)(5), the Plaintiff must demonstrate that (1) at a time not too remote from the bankruptcy, the Debtor owned identifiable assets; (2) on the day that he commenced his bankruptcy case, the Debtor no longer owned those assets; and (3) his schedules and/or bankruptcy pleadings do not offer an adequate explanation for the disposition of those assets. *Schilling v. O'Bryan (In re O'Bryan)*, 246 B.R. 271, 279 (Bank. W.D. Ky. 1999); *see also Ernst v. Walton (In re Walton)*, 103 B.R. 151, 155 (Bankr. W.D. Ohio 1989). The burden then shifts to the Debtor to offer a satisfactory explanation of the whereabouts of the assets. *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 619 (11th Cir. 1984). The Plaintiff is not required to prove that the Debtor acted knowingly or fraudulently. *Walton*, 103 B.R. at 155.

The Plaintiff's Complaint states twice that the Debtor has failed to satisfactorily explain a loss and deficiency of assets, but it offers no facts associated with those allegations. To meet the initial burden of proof, the Plaintiff must show that the Debtor has disposed of identifiable

assets without adequately explaining their disposition. However, the Complaint does not identify any assets which were allegedly disposed of prior to the bankruptcy filing, nor does it state any facts or averments concerning the Debtor's allegedly insufficient explanation thereof. Taking the Complaint in a light most favorable to the Plaintiff, the court finds that it has alleged no facts upon which relief may be granted pursuant to § 727(a)(5).

IV

In summary, the court finds that the Complaint filed by the Plaintiff on July 14, 2004, fails to sufficiently state facts upon which relief may be granted as requested under § 523(a)(2), (4), (6) or § 727(a)(5). Furthermore, although the Plaintiff seeks relief under § 523(a)(2) and/or (a)(4), both of which are based upon fraud, the Complaint does not state with particularity sufficient facts or circumstances concerning the Debtor's alleged fraudulent actions and/or his fraudulent intent. Accordingly, the Debtor's Motion to Dismiss shall be granted, and the Plaintiff's Complaint will be dismissed.

An order consistent with this Memorandum will be entered.

FILED: September 17, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

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Debtor

UNION PLANTERS BANK, N.A.

Plaintiff

v. Adv. Proc. No. 04-3178

SAMUEL RICHARD HARRIS

Defendant

O R D E R

For the reasons stated in the Memorandum on Motion to Dismiss filed this date, the court directs that the Defendant's Motion to Dismiss filed on August 20, 2004, is GRANTED. The Complaint to Determine Dischargeability of Debt or in the Alternative to Deny Debtor's Discharge as to Union Planters Bank, N.A., filed by the Plaintiff on July 14, 2004, is DISMISSED.

SO ORDERED.

ENTER: September 17, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE